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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

SAUL ROSOFF, Petitioner, v. THE SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent; MEDICAL BOARD OF CALIFORNIA, Real Party in Interest.	C044623 (Super. Ct. No. 02CS01790)

The Medical Board of California (Board) placed the license of Saul Rosoff, M.D., on probation for one year with a stayed 30-day suspension because he made three unprofessional comments and practiced improper record-keeping. The superior court found

the improper record-keeping allegations unsupported by the record; however, that court upheld the Board's discipline based upon Dr. Rosoff's comments.

Dr. Rosoff filed a petition for a writ of mandate in this court challenging the superior court's decision. He contends (1) he "did not commit even one act of simple negligence, let alone the two or more required for discipline;" (2) these comments "do not, as a matter of law, reasonably relate to his qualifications as a physician" and thus cannot constitute unprofessional conduct; and (3) his "First Amendment rights are violated by the discipline imposed on him." We issued an alternative writ.

We conclude the facts presented during the administrative proceedings support the discipline imposed on Dr. Rosoff. We also conclude Dr. Rosoff waived his First Amendment claim by failing to raise it at the appropriate time. Accordingly, we deny the petition for writ of mandate.

FACTS AND PROCEDURE

Dr. Rosoff is a licensed proctologist and gastroenterologist. He has been practicing medicine since 1978.

The executive director of the Board filed a second amended accusation that sought to revoke or suspend Dr. Rosoff's license to practice medicine. The relevant accusations are: (1) repeated negligence in the treatment of two patients under

section 2234, subdivision (c)[1] and (2) unprofessional conduct in Dr. Rosoff's treatment of the same patients.

These allegations of the accusation arose from complaints by L.G. and G.S.[2] about the manner in which Dr. Rosoff treated them. The accusation alleged Dr. Rosoff improperly touched these patients, made inappropriate comments, conducted rectal examinations too often and in an embarrassing manner, and failed adequately to record information about these visits in medical charts.

The lengthy administrative hearing produced the following facts:

Treatment of Patient L.G.

L.G. testified her physician referred her to Dr. Rosoff for a stomach acid problem. The first time she saw Dr. Rosoff was on November 30, 1999. She had recently separated from her husband and was under a great deal of stress at the time. L.G. visited Dr. Rosoff three times. L.G. made her third and final

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[1] Business and Professions Code section 2234, subdivision (c) provides, in part: "[U]nprofessional conduct includes, *but is not limited to*, . . . [r]epeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts." (Italics added.) Hereafter, citations to an unspecified code are to the Business and Professions Code.

[2] The Board used initials to protect the privacy of the patients at issue here.

visit on January 17, 2000. At the end of the physical examination, L.G. met Dr. Rosoff in his office.

When L.G. arrived in his office, L.G. testified Dr. Rosoff stood up from his chair and told her "what he thought was on an afternoon when my kids were in school and I have free time that I should experience the orgasm that I had yet to experience." Prior to that time, L.G. had no discussions with Dr. Rosoff of any sexual matters. She was shocked and embarrassed by this comment. L.G. responded, "[T]hat is not why I am here, and that is not what I need." Dr. Rosoff replied that he was surprised that L.G. knew herself that well. L.G. responded, "I definitely do" and stood up and walked out. L.G. reported this conduct to the Board.

Treatment of Patient G.S.

G.S. testified she went to see Dr. Rosoff on April 20, 2000, on the recommendation of her husband, who was also Dr. Rosoff's patient. She was having severe stomach pains and pain in her chest. She also coughed up clots of blood, felt weak, lost weight and had bad acid indigestion.

G.S. filled out a patient questionnaire on her first visit. The receptionist then directed her into an examination room. G.S. saw Dr. Rosoff in the hallway and the first thing he said to her was that her husband was "robbing the cradle." G.S. was shocked by the comment, although she was 20 years younger than her over-60-year-old husband. Dr. Rosoff told G.S. she was so young, so sweet, and so beautiful throughout the examination.

G.S. testified Dr. Rosoff was fixated on her breasts the entire physical examination. According to G.S., the first thing Dr. Rosoff said to G.S. was, "Why are your breasts so large? It's not what's on your chest. It's what's in your head." G.S. testified she felt humiliated and confused. G.S. testified Dr. Rosoff asked her how her breasts felt when her husband "plays around with" them and she responded that she experienced pain. While the chart indicated Dr. Rosoff palpated and moved G.S.'s breasts to the side, G.S. testified Dr. Rosoff did not touch her breasts. Further, she told Dr. Rosoff her breasts had hardened after her breast augmentation surgery and also that she had suffered trauma to her chest. On cross-examination, G.S. also admitted she suffered pain from her breast implants.

During one of the first two visits, Dr. Rosoff repeatedly asked G.S. about whether she had anal sex. G.S. responded negatively.

On her fourth and final visit, G.S. returned to see Dr. Rosoff again. She was dressed in a T-shirt and a short skirt. As she was getting ready to leave the office, Dr. Rosoff asked G.S., "How does your husband let you out of the house? I'd want you all to myself. I'd be so jealous." G.S. interpreted this comment as a come-on. G.S. responded by telling Dr. Rosoff her husband was not a jealous man. After that, Dr. Rosoff gave G.S. a "bear hug from behind" and a kiss on her cheek. G.S. left the office and never returned. She later filed a civil suit against Dr. Rosoff. That suit was dismissed.

Testimony of Dr. Rosoff and Others

Dr. Rosoff testified he did not breach the standard of care in his treatment of either L.G. or G.S. He denied making the comment about an orgasm to L.G. However, this denial is contrary to the ALJ's findings.

As to his comments about G.S. being young and beautiful, Dr. Rosoff testified he was surprised at her youthful appearance and attempted to allay her fears about a potential heart condition by explaining that young people do not usually have heart conditions.

Further, Dr. Rosoff testified G.S. reported having proctalgia fugax -- pain in her anus -- and that was the reason Dr. Rosoff asked her about her history of anal sex. He repeated his inquiry on this subject in different ways because she hesitated when she gave her initial answer.

In the examination room, Dr. Rosoff noticed G.S.'s breasts were imbalanced and pendulous and inquired why they were so large and about whether she had any scars from her cosmetic augmentation surgeries. He asked her where her scars were from the operation to confirm whether the implants were located under or over her pectoral muscle. He confirmed that when he pushed on her bra, it increased her chest pain. He denied asking her how her breasts felt when her husband played with them. Dr. Rosoff testified he counseled G.S. that her breasts were too big for her body and told her to consult with a plastic surgeon about removing her breast implants, and this upset G.S. Dr. Rosoff testified he told G.S. she was going to age no matter

what she did, and what was important was what was in her heart and in her head.

Two of Dr. Rosoff's employees testified that G.S. was dressed very provocatively, in a "very short skirt" and a "low-cut blouse," when she visited his office. When G.S. sat down in the waiting room, it was possible to see her underwear. Dr. Rosoff testified he asked G.S. to tone down the way she dressed in response to concerns from two of his patients and his staff. The Board found it was in this context that Dr. Rosoff told G.S. he would not allow her to leave the house in the manner she was dressed if he were her husband.

Dr. Rosoff also presented the testimony of character witnesses and a stack of letters in support of his practices and character. His patients and employees testified Dr. Rosoff treats the whole person and is "compulsively meticulous" and thorough.

Expert Witnesses

The Board called Peter Barrett, M.D., a specialist in internal medicine and gastroenterology. Dr. Barrett testified it was his opinion Dr. Rosoff breached the standard of care in his treatment of L.G. and G.S.

As to L.G., Dr. Barrett testified Dr. Rosoff's "orgasm" comment was inappropriate. As to G.S., Dr. Barrett testified Dr. Rosoff's conduct of giving her a hug and a kiss on the head fell below the standard of care. Dr. Barrett also testified it was his opinion that Dr. Rosoff's medical charts for both patients failed to meet the standard of care because they were

incomplete and ambiguous. On cross-examination, Dr. Barrett admitted it was appropriate to examine oversized breast implants to determine the cause of substernal chest pain.

Dr. Rosoff called William Metzger, M.D., a board certified gastroenterologist, to testify on his behalf. Dr. Metzger concluded Dr. Rosoff's treatment of L.G. and G.S. did not breach the standard of care. Dr. Metzger admitted it would breach the standard of care to "verbally abuse" or "embarrass a patient." Dr. Metzger concluded that Dr. Rosoff's comments to his patients were not improperly motivated and demonstrated no malicious intent. He also concluded that Dr. Rosoff's inquiries into G.S.'s breasts and sexual history were medically appropriate.

Dr. Metzger concluded the manner in which Dr. Rosoff examined his patients was extremely thorough and met the standard of care. Dr. Metzger also testified Dr. Rosoff's medical records were adequate and met the standards of care.

ALJ's Findings of Fact and Conclusions of Law

As between Dr. Rosoff and L.G., the ALJ determined that L.G.'s testimony concerning the "orgasm" comment was more credible than Dr. Rosoff's. The ALJ credited Dr. Rosoff's version as more credible than G.S.'s, finding G.S. evasive, nonresponsive, and self-contradictory.

Ultimately, the ALJ found Dr. Rosoff made three inappropriate comments to these two patients. Specifically, those comments were: (1) the comment to L.G that she should experience the orgasm she had never experienced; (2) his statement to G.S. that she was young and her husband was robbing

the cradle; and (3) his comments to G.S. about her dress and his comment that, if she were his wife, he would not allow her out of the house looking like she did. The ALJ found that these comments did not constitute sexual misconduct because Dr. Rosoff did not make them for his own sexual gratification, but instead made them as "well-intentioned attempts to communicate with patients about patient care concerns or to establish physician-patient rapport." The ALJ further concluded the comments constituted unprofessional conduct and negligence. The ALJ also concluded Dr. Rosoff's charting practices were unacceptable and constituted negligence.

The ALJ found Dr. Rosoff did not deviate from the standard of care in any other respect and had not engaged in any sexual misconduct. The ALJ found the complainant had "not established a deviation from the standard of care in [Dr. Rosoff's] performance of repeat rectal examinations" either in the frequency, or the appropriateness of the procedures he used.

Based on these findings, the ALJ recommended that Dr. Rosoff's license be suspended for 30 days, but that the suspension be stayed for one year with his license placed on probation during that time. The Board adopted the ALJ's decision in its entirety.

The Superior Court's Ruling

Dr. Rosoff filed a petition for writ of mandate in the Sacramento County Superior Court challenging his discipline. The trial court granted the petition in part and denied it in part. The trial court sustained the Board's findings as to the

negligence in the treatment of Dr. Rosoff's patients, but found no evidence supporting the allegations concerning his charting practices. This writ petition followed. (§ 2237.)[3]

DISCUSSION

I

Unprofessional Conduct

"The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, *but is not limited to*," violation of the Medical Practice Act, gross negligence, repeated negligent acts, incompetence, dishonesty or corruption, and others. (§ 2234, italics added.) "Unprofessional conduct is that conduct which breaches the rules or ethical code of a profession, or conduct which is unbecoming a member in good standing of a profession." (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 575, fn. omitted.)

Dr. Rosoff asserts his conduct was insufficient to support discipline under section 2234 because it did not rise to the level of professional negligence, as a matter of law, and it did not reasonably relate to his qualifications as a physician. We disagree.

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[3] Section 2337 provides, in pertinent part: "Notwithstanding any other provision of law, review of the superior court's decision shall be pursuant to a petition for an extraordinary writ."

This doctor told one patient to go have an orgasm. He told another that her husband was robbing the cradle and that, if she were his (the doctor's) wife, he would not let her out of the house dressed as she was. This locker room behavior predictably offended these two female patients who were in the vulnerable position of seeking medical care for private and personal medical problems. The ALJ noted the three comments were "inappropriate and without medical justification in the existing physician-patient context." Although the ALJ and the Board expressly found that Dr. Rosoff made them as "well-intentioned attempts to communicate with patients about patient care concerns or to establish physician-patient rapport," they concluded the statements were unprofessional and breached the standard of care. Substantial evidence supports the Board's findings that Dr. Rosoff's comments constituted unprofessional conduct pursuant to section 2234.

To constitute unprofessional conduct for which disciplinary action may be taken, the conduct need not fall within the specific forms of conduct enumerated in section 2234. The statute states, "unprofessional conduct includes, *but is not limited to*, the following . . . ." (Italics added.) Inappropriate statements need not constitute "gross negligence" or "repeated acts of negligence" to be unprofessional. The

statements must fall within the general definition of unprofessional conduct, and in this case they do.[4]

Dr. Rosoff relies on *Thorburn v. Department of Corrections* (1998) 66 Cal.App.4th 1284 (*Thorburn*). In *Thorburn*, which was not an action against a physician's license but instead an action by physicians to have the court declare that participating in executions constituted unprofessional conduct, the court determined that executions do not fall under any of the enumerated categories for discipline. (*Id.* at p. 1290.) *Thorburn* is particularly inapplicable to the consideration of this case because, essentially, it was simply a confirmation that California public policy favors the death penalty in appropriate circumstances and nothing in the Medical Practice Act trumps that public policy. (*Id.* at p. 1292.) There is no comparable public policy favoring offensive sexual remarks.

Once Dr. Rosoff made the unprofessional statements that caused L.G. and G.S. to delay or terminate their treatment, Dr. Rosoff compromised their treatment. This is not to suggest a physician can be disciplined for any comment that offends a patient; instead, it means that a physician is subject to discipline for unprofessional statements that he, as a professional, should have known would offend the patient and

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[4] Consequently, we need not consider at length whether Dr. Rosoff committed "repeated acts of negligence." Suffice it to say that three unprofessional comments that had the effect of damaging irreparably the physician-patient relationship and were made during the patients' visits to Dr. Rosoff's office were each an act of professional negligence.

interfere with the physician-patient relationship and cause emotional distress. It is precisely the unprofessional nature of the conduct that caused the breakdown in the physician-patient relationship. Communication of this sort may act as a disincentive to patients to seek help for certain ailments or to delay treatment while attempting to locate a physician who does not offend the sensibilities of a reasonable person.

Dr. Rosoff contends he cannot be disciplined for his statements because they were made in good faith. Supposedly well-intentioned compliments or comments may still be unprofessional and damage the physician-patient relationship. Dr. Barrett testified Dr. Rosoff's comments were inappropriate and breached the standard of care. The ALJ agreed. Certainly, the Board is not powerless to take action against unprofessional conduct just because the doctor was not seeking sexual gratification. The intentions of the doctor do not negate the fact that the statements were unprofessional, causing emotional distress and offending the patient, who will be unlikely to continue treatment with the unprofessional physician. The Board need not allow a doctor to offend patients with unprofessional comments as long as the comments are made in good faith, just as the Board cannot allow a doctor to undertake unprofessional treatment that the doctor unreasonably believes is appropriate. Ill-chosen discourse that damages the physician-patient relationship and offends the patient, thereby causing increased apprehension and consternation while reducing the patient's prospect of receiving adequate and timely care, is

unprofessional, as noted by the expert, and warrants discipline. This conduct indicates unfitness to practice because it breached the rules or ethical code of the medical profession and was unbecoming a physician in good standing. (*Shea v. Board of Medical Examiners, supra,* 81 Cal.App.3d at p. 575.)

Quoting a teacher discipline case, Dr. Rosoff argues: "[T]hey cannot be disciplined merely because they made a reasonable, good faith, professional judgment in the course of their employment with which higher authorities later disagreed." (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 233.) This argument fails because Dr. Rosoff's comments were neither professional nor reasonable, even if they were made in good faith.

There is a substantial relationship between Dr. Rosoff's unprofessional conduct and his qualifications, functions, or duties as a physician. "[A] statute can constitutionally bar a person from practicing a lawful profession only for reasons related to his fitness or competence to practice that profession." (*Newland v. Board of Governors of California Community Colleges* (1977) 19 Cal.3d 705, 711.) Here, as a consequence of Dr. Rosoff's unprofessional statements made during the patients' visits to Dr. Rosoff's office for treatment, two patients under his care were predictably offended, lost confidence in Dr. Rosoff, and had to either seek treatment from another physician or forego treatment altogether. In fact, Dr. Rosoff's own argument refutes his contention that his comments were unrelated to his practice of medicine. He

argues: "Dr. Rosoff made [these] comments in a good faith attempt to be a good physician . . . ."

In the same vein, Dr. Rosoff asserts the Board's decision did not sufficiently set forth findings his conduct was related to his fitness to practice medicine. (See *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 ["the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order"].) Here, the Board made extensive findings of fact, as recounted above. Based on these facts, the Board concluded Dr. Rosoff acted unprofessionally in his care and treatment of L.G. and G.S., citing specific findings of fact. Therefore, Dr. Rosoff's contention the Board's decision did not set forth findings that his conduct was related to his fitness to practice is without merit.

Also concerning the relationship between his conduct and his fitness to practice, Dr. Rosoff claims his constitutional due process rights were violated by this discipline because his conduct was not directly related to his fitness to practice. "Civil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies. [Citations.] The knowledge that he has erred is of little value to the teacher [here, physician] when gained only upon the imposition of a disciplinary penalty that jeopardizes or

eliminates his livelihood." (*Morrison v. State Board of Education, supra,* 1 Cal.3d at p. 231, fn. omitted.) There is no constitutional violation here. The discipline was based on conduct Dr. Rosoff reasonably should have known was unprofessional and breached the standard of care, as shown by expert testimony.

II

First Amendment

Finally, Dr. Rosoff contends his "First Amendment rights are violated by the discipline imposed on him." Dr. Rosoff's failure to raise his First Amendment right to free speech in either the disciplinary proceedings or subsequent mandamus proceedings precludes him from raising the issue on appeal. (*Shea v. Board of Medical Examiners*, *supra,* 81 Cal.App.3d at pp. 576-577.) In any event, the contention fails. "The Legislature has the power to enact laws, within constitutional limits, to protect the safety, health, morals, and general welfare of society. [Citation.] It has the right to require that those licensed to practice medicine be of good moral character, reliable, trustworthy, and not given to deception of the public or to the practice of imposing upon credulous or ignorant persons. [Citation.] The constitutional protection accorded to speech applies here only insofar as the speech used does not impair the patient-physician relationship." (*Id.* at p. 577.)

DISPOSITION

The alternative writ of mandate is discharged and the petition for a peremptory writ of mandate is denied.

NICHOLSON, Acting P.J.

I concur:

RAYE, J.

ROBIE, J.

I respectfully dissent.

This case concerns a proctologist, Dr. Rosoff, who allegedly: (a) inappropriately touched his patients; (b) engaged in questionable treatment practices; and (c) made questionable comments while treating two of his patients.[1] If the administrative law judge (ALJ) had found any merit in the first two items of charged misconduct, I would join my colleagues in upholding the discipline order. Further, if the ALJ had concluded that Dr. Rosoff made the ill-chosen comments with a lewd or lascivious intent or that his conduct rose to the level of sexual harassment, I would concur in the majority

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[1] In addition to the charge of repeated negligence specifically identified by the majority, the second amended accusation in this case specified six separate causes for discipline: (1) sexual misconduct under Business and Professions Code (further unspecified section references are to this code) section 726 in Dr. Rosoff's treatment of patient L. G.; (2) sexual misconduct under section 2234, subdivision (b), in Dr. Rosoff's treatment of patient G. S.; (3) gross negligence in the treatment of both patients under section 2234, subdivision (b); (4) repeated negligence in the treatment of both patients under section 2234, subdivision (c); (5) failure to maintain adequate records under section 2266; and (6) unprofessional conduct in Dr. Rosoff's treatment of both patients. At the administrative hearing, the Medical Board of California (Medical Board) attempted to demonstrate, *intra alia*, that Dr. Rosoff conducted an excessive number of rectal examinations and that he conducted them in an improper manner, engaged in wrongful conduct concerning a breast condition of one of the patients, improperly touched his patients, and that his practice of smelling feces to detect the odor of infections was improper.

opinion. The Medical Board has the right and, indeed, the duty, to protect patients from those types of unprofessional conduct.

However, the ALJ made no such findings. After listening to the conflicting testimony that consumed 13 days and over 2,200 pages of transcript, and considering almost 100 pages of favorable written references submitted on the doctor's behalf, the ALJ expressly found Dr. Rosoff's examinations were medically appropriate, both in frequency and in manner and that Dr. Rosoff did not improperly touch his patients. In fact, the ALJ exonerated the doctor of each and every allegation of misconduct, except those based on three ill-chosen comments the doctor made.

As to the *words* he used, Dr. Rosoff told one severely stressed patient that she should go experience an orgasm. Dr. Rosoff told a second patient that her husband was robbing the cradle, and that if she were his wife he would not allow her to go out dressed in the manner she was dressed on one visit to his office. The ALJ found that *none* of the three comments constituted sexual misconduct. Rather, he found Dr. Rosoff made these comments as "well-intentioned attempts to communicate with patients about patient care concerns or establish physician-patient rapport."

Given the ALJ's specific findings that Dr. Rosoff acted with good faith and that his comments did not constitute sexual misconduct, I conclude the imposition of discipline on Dr. Rosoff based upon these *words* is impermissible under section 2234. My conclusion is further buttressed by the ALJ's finding

that Dr. Rosoff's diagnosis and treatment of these patients were medically appropriate and by the exhaustive list of positive recommendations and testimony supporting the doctor's character.

"The purpose of the State Medical Practice Act (§ 2000 et seq.) is to assure the high quality of medical practice; in other words, to keep unqualified and undesirable persons and those guilty of unprofessional conduct out of the medical profession." (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 574.) "Unprofessional conduct is that conduct which breaches the rules or ethical code of a profession, or conduct which is unbecoming a member in good standing of a profession." (*Id.* at p. 575.) I conclude this standard has not been met.

I

Dr. Rosoff's Words Do Not Constitute Unprofessional Conduct

I disagree with the majority's conclusion that *Thornburn v. Department of Corrections* (1998) 66 Cal.App.4th 1284 (*Thornburn*) has no relevance here. In *Thornburn*, several physicians sued the Department of Corrections arguing it constituted unprofessional conduct under section 2234 for a physician to participate in executions. (*Thornburn*, at pp. 1285-1286.) The appellate court disagreed. (*Id.* at p. 1293.) The court exhaustively examined the subject of unprofessional conduct and began its analysis with the statutory language of section 2234. (*Thornburn*, at p. 1288.) Section 2234 states "[t]he Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other

provisions of this article, unprofessional conduct includes, but is not limited to, the following: [¶] (a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter. [¶] (b) Gross negligence. [¶] (c) Repeated negligent acts. . . . [¶] . . . [¶] (d) Incompetence. [¶] (e) The commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon. [¶] (f) Any action or conduct which would have warranted the denial of a certificate. [¶] (g) The practice of medicine from this state into another state or country without meeting the legal requirements of that state or country for the practice of medicine. . . .” The *Thornburn* court concluded participation in an execution falls in none of these categories. (*Thornburn, supra,* 66 Cal.App.4th at p. 1290.)

Next, the *Thornburn* court listed the various and sundry acts that may be grounds for discipline or the loss of a professional license: “(See, e.g., §§ 2234 [general definition of ‘unprofessional conduct’], 2236 [conviction of crime substantially related to the qualifications, functions or duties of a physician as unprofessional conduct], 2238 [conviction of federal or state laws regulating dangerous drugs and controlled substances as unprofessional conduct], 2239 [misuse or abuse of dangerous drugs, controlled substances or alcoholic beverages as unprofessional conduct], 2280 [practice of medicine while under the influence of narcotic drug or alcohol as unprofessional

conduct], 2241 [furnishing drugs or controlled substances to an addict as unprofessional conduct], 2253 [procuring, aiding, or abetting an illegal abortion, except as authorized by the Therapeutic Abortion Act (Health & Saf. Code, § 123400 et seq.) as unprofessional conduct], 2271 [false or misleading advertising as unprofessional conduct]; *Glover v. Board of Medical Quality Assurance* (1991) 231 Cal.App.3d 203, 205-206 [282 Cal.Rptr. 137] [physician's license revoked for repeatedly dispensing potentially lethal doses of prescribed medications for a patient who had attempted and ultimately succeeded at suicide using these medications]; *Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 470 [163 Cal.Rptr. 566] [physician convicted of evading $65,000 in taxes subject to discipline]; *Shea*, *supra*, 81 Cal.App.3d at pp. 578-579 [physician's license revoked because of improper sexual conduct with four patients, coupled with unwanted treatment without an adequate medical history]; *Matanky v. Board of Medical Examiners* (1978) 79 Cal.App.3d 293, 304-305 [144 Cal.Rptr. 826] [physician's license revoked because he intentionally submitted several false and fraudulent Medicare claims for purpose of personal gain].)" (*Thornburn, supra,* 66 Cal.App.4th at pp. 1291-1292.) When judged by these standards, the appellate court concluded, "there is nothing about physician participation in executions which automatically constitutes 'unprofessional conduct' or renders a participating physician 'unfit' to practice medicine in California." (*Id.* at p. 1292.)

Applying these standards here, I conclude the imposition of discipline on Dr. Rosoff was improper. The ALJ found Dr. Rosoff did not make any of the three inappropriate comments for his own sexual gratification and further that these comments did not constitute sexual misconduct. To the contrary, the finder of fact expressly found Dr. Rosoff made them as "well-intentioned attempts to communicate with patients about patient care concerns or to establish physician-patient rapport." Further, the ALJ and the Medical Board found Dr. Rosoff committed no other acts that could be construed as sexual misconduct or negligence.

Given these findings, Dr. Rosoff's uttering of three poorly chosen comments has nothing in common with any of the acts of misconduct listed in section 2234. These inappropriate comments do not constitute "gross negligence." (See *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052-1053 ["Gross negligence is '"the want of even scant care or an extreme departure from the ordinary standard of conduct"'" in the treatment of patients].)

These words do not reflect Dr. Rosoff's incompetence as a physician. Saying these words does not constitute an act of dishonesty, or an act that could have warranted denial of the license in the first instance. In fact, the making of these comments shares nothing in common with the other grounds for imposing discipline in the statutes and reported cases, like the conviction of crimes, the misuse of drugs, the provision of illegal abortions, false advertising, or tax evasion.

I further conclude Dr. Rosoff's use of these words in a good faith attempt to communicate with two of his patients does not constitute repeated acts of negligence under section 2234, subdivision (b). In defining negligence, section 2234, subdivision (b) provides, "Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts. [¶] (1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act. [¶] (2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care." This subdivision applies to the care and treatment of a patient, not ill-chosen words used while conversing with the patient. Moreover, the ALJ and the Medical Board explicitly found Dr. Rosoff's treatment of these patients to be reasonable and prudent and consistent with the standard of care for family physicians in Southern California. Thus, the repeated acts of negligence ground for discipline is inapplicable.

Further I disagree with my colleagues' conclusion the treatment of the two patients here was compromised by these

words. The only fact contained in the record on this point is that the two patients stopped seeing Dr. Rossoff. As the ALJ found, however, "[i]t was not established that respondent deviated from the standard of care in any other respect. He treated, or was in the process of treating, all disclosed patient complaints in a reasonable and prudent manner, consistent with the standard of care for family physicians in Southern California." Moreover, both patients obtained successful treatment from different physicians after they left their physician-patient relationship with Dr. Rosoff. Their treatment was not compromised by Dr. Rosoff's words.

II

Words May Form The Basis For Discipline

While I conclude discipline is inappropriate here, it does not follow that a physician's words may never form the basis for discipline. (See *Shea v. Board of Medical Examiners, supra,* 81 Cal.App.3d 564.)

In *Shea*, Dr. Shea was disciplined for attempting to "treat" four of his patients by hypnotizing them and while they were under hypnosis describing an act of sexual foreplay and intercourse to them. (*Shea v. Board of Medical Examiners, supra,* 81 Cal.App.3d at pp. 571-574.) The court concluded the record supported "the trial court's finding that the explicit descriptions of sexual foreplay and sexual intercourse were unsolicited. It also abundantly supports the finding that such descriptions were in lurid and salacious detail. Unchallenged expert testimony established that Dr. Shea's conduct was

unprofessional in his failure to obtain an adequate history, the lack of relationship of the treatment to the patient's complaint, and conduct by Dr. Shea harmful to the physician-patient relationship." (*Id.* at p. 578.) As a result, discipline was appropriately imposed for this unprofessional conduct. (*Id.* at pp. 578-579.)

Here, Dr. Rosoff's conduct shares nothing in common with Dr. Shea's attempt to hypnotize his patients and his description of salacious sexual details as a manner of treatment. (*Shea v. Board of Medical Examiners, supra,* 81 Cal.App.3d at pp. 571-574.) At best, Dr. Rosoff's words were ill-chosen. At worst, they were boorish. As the ALJ found, however, Dr. Rosoff was not trying to seduce these women or sexually gratify himself. His words were well-intentioned, but ultimately misplaced attempts to communicate and establish patient rapport. His choice of these words was simply poor.

The majority points to the language of section 2234 which states that unprofessional conduct "includes, but is not limited to," the items listed in that section. Although I agree acts that are not specifically listed in that section can constitute unprofessional conduct, in pursuing the proper objective of protecting patients, the courts may not give an "overly broad connotation" to "the term 'unprofessional conduct;' it must relate to conduct which indicates an unfitness to practice medicine. [Citations.]" (*Shea v. Board of Medical Examiners*, *supra*, 81 Cal.App.3d at p. 575.)

"[C]onstitutional considerations require that a statute 'bar a person from practicing a lawful profession only for reasons related to his fitness or competence to practice that profession.' [Citations.]" (*Gromis v. Medical Board* (1992) 8 Cal.App.4th 589, 594-595.) Stated another way, discipline may only be imposed for conduct that bears some relationship to the physician's qualifications, functions or duties. (*Id.* at p. 594.) In *Gromis,* the appellate court reversed Dr. Gromis's discipline for having engaged in sexual activity with one of his patients. (*Id.* at pp. 591, 600.) The court stated, "we decline to hold as a matter of law that only sexual conduct under guise of treatment can serve as grounds for discipline. Rather, the question must be decided on a case-by-case basis: whether under the circumstances the sexual conduct bears some relationship to the physician's qualifications, functions or duties." (*Id.* at pp. 597-598.) This is a question of law for the appellate court. (*Id.* at p. 598.)

The connection between these words and Dr. Rosoff's qualifications, functions, or duties as a physician is absent here. The record explicitly shows these comments were not made to seduce the patients. Dr. Rosoff did not attempt to abuse his status as a physician. Dr. Rosoff's words did not compromise the treatment of the patients.

Cases addressing the issue of sexual harassment in the work place provide a sound and established basis for evaluating discipline based on the conduct presented here.

In the sexual harassment arena, there are two types of actionable sexual harassment: quid pro quo and hostile or abusive environment harassment. (*Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 160.) Quid pro quo "'consists, as the Latin phrase signifies, of unwelcome demands for sexual favors in return for advancement or other perquisites in the workplace. Sex-based hostile or abusive environmental claims, on the other hand, arise when "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe *or* pervasive to alter the conditions of the victim's employment' . . . ." . . . [Citation.]' [Citation.] However, the harassment need not be severe *and* pervasive in order to impose liability; either severe *or* pervasive will suffice." (*Id.* at pp. 160-161.)

Nothing in this record implicates the quid pro quo type of harassment. As relevant here, the prohibitions of the hostile work environment sexual harassment law "are not designed to rid the workplace of vulgarity." (*Sheffield v. Los Angeles County Dept. of Social Services*, *supra,* 109 Cal.App.4th. at p. 161.) It is for this reason that, "[t]o be actionable, the conduct must be extreme, but there is no requirement that the employee endure sexual harassment until his or her psychological well-being is so spent that the employee requires psychiatric assistance. [Citation.]" (*Ibid.*)

Similarly, in the discipline arena, the imposition of discipline should not be based on three well-intentioned

comments to which the listener took offense. It is not the job of the Medical Board, other licensing agencies, or this court to police etiquette and impose discipline based upon impolite social discourse. Two of the comments were made to a patient the ALJ found to be evasive, nonresponsive, and self-contradictory. In substance, the two comments were that the patient's husband was robbing the cradle and she was improperly dressed. These words are not extreme conduct and constitute neither severe nor pervasive conduct. While the patient may have taken offense at these words, these words do not constitute sexual harassment under the law.

The comment to L. G. that she should have an orgasm comes closer to the line. I conclude, however, this single comment did not cross that line. The comment did not rise to the level of severe or pervasive conduct such that it constituted sexual harassment. Even the patient concluded that the comment was not "boorish at all" but rather was simply "inappropriate." I conclude inappropriate comments should not have been the basis for the Medical Board to discipline Dr. Rosoff.

III

Conclusion

In the end, I do not condone Dr. Rosoff's unorthodox and inappropriate "bedside" manner. I hope Dr. Rosoff has learned to speak to his female patients with more respect and less vulgarity. At the same time, I conclude these words do not constitute repeated negligence or unprofessional conduct for purposes of discipline of his license under the Business and

Professions Code. The imposition of discipline under these circumstances trivializes the disciplinary system and the concept of unprofessional conduct. I would reverse.

ROBIE, J.